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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT SMITH,

Defendant and Appellant.

F057986

(Super. Ct. No. 08CM8838)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Janet J. Gray, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Janis Shank McLean, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Appellant/defendant Vincent Smith, an inmate at Avenal State Prison, was convicted after a jury trial of possession of marijuana while incarcerated in a prison

facility (Pen. Code,¹ § 4573.6). The court found true the special allegations that he had six prior serious or violent felony convictions within the meaning of the Three Strikes law (§ 667, subds. (b)-(i)). The court declined to dismiss any of the prior strike convictions, and sentenced defendant to the third strike term of 25 years to life.

On appeal, defendant contends the court abused its discretion when it denied his motion to dismiss his prior strike convictions. Defendant also contends his third strike conviction constitutes cruel and/or unusual punishment. We will affirm.

FACTS

On May 10, 2008, Correctional Officer Timothy Davis was assigned to the dining hall at Avenal State Prison. He conducted random clothed-body searches of the inmates to make sure they did not have any contraband when they left the dining hall. Davis had already searched three inmates when he randomly selected defendant and conducted a patdown search over his clothes. Davis detected an object along defendant's waistband. Davis asked defendant about the object, and defendant said it was marijuana.

After a thorough search of defendant, Davis discovered defendant was wearing personal athletic shorts under his prison-issue pants. The shorts contained an inmate-manufactured pocket. There were three items inside the pocket: two round bindles which were wrapped in clear cellophane and one bindle which was inside a tubular object.

The bindles contained 6.27 net grams of marijuana and five hand-rolled cigarettes which weighed 2.2 net grams, for a total of 8.47 grams. One of the cigarettes was tested, and it was positive for marijuana. The evidence officer inadvertently destroyed the shorts that contained the contraband.

¹ All further statutory citations are to the Penal Code unless otherwise indicated.

The prior strike convictions.

The court found true the special allegations that defendant had six prior felony convictions within the meaning of the Three Strikes law. All of defendant's prior convictions, including the strikes, were from a single case in Riverside County in 1997. The prosecution's documentary evidence and the probation report contain the following information about defendant's criminal record.

Defendant was arrested in Riverside County in December 1996, and he was convicted by a jury on July 1, 1997, of committing the following felony offenses in 1996: counts 1 and 2, attempted rape by force or fear (§ 664, § 261, subd. (a)(2)); counts 3 and 4, penetration by force (§ 289, subd. (a)); count 5, oral copulation of a minor under 16 years (§ 288a, subd. (b)(2)); count 6, commission of a lewd act with a child (§ 288, subd. (c)); and counts 7 and 8, an adult's use of a minor for an illegal transaction involving a controlled substance (Health & Saf. Code, § 11353). On August 18, 1997, defendant was sentenced to an aggregate term of 21 years, based on the upper term of nine years for count 7, fully consecutive midterms of six years for both counts 3 and 4, and concurrent terms for the remaining counts. Defendant was going to be eligible for parole in 2014.

Defendant was serving the sentence in the 1997 case when he committed the offense in this case. The probation report did not contain any details about the factual background for defendant's prior convictions. As to the instant case, the probation officer recommended imposition of the third strike term of 25 years to life.

The sentencing hearing.

At the sentencing hearing, defense counsel requested the court to dismiss one or more prior strike convictions, pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*). Defense counsel stated he did not have "all the information" about the facts of the prior convictions, but he argued the prior strikes involved a closely related course of conduct in the context of a single case. Defense counsel further noted the current offense was for possession of a small amount of

marijuana, and it would have “barely qualified” as a misdemeanor if defendant had committed the offense “on the street.” Defense counsel asserted it was “unfortunate” that the offense was a felony simply because defendant possessed the drugs inside state prison. Defense counsel also argued imposition of an indeterminate term would be cruel and unusual punishment.

The prosecutor replied that defendant’s prior convictions involved multiple sex crimes and he was convicted of different statutory offenses. The prosecutor further argued the current offense was a felony because of defendant’s possession of drugs within the controlled nature of prison. Defendant possessed 8.47 grams, which was “a great deal of marijuana . . . [and] a significant amount for the prison setting.”

The court stated it had considered the *Romero* factors. The court denied defendant’s request under section 1385 and found it would not be appropriate to dismiss the prior strikes. The court found defendant committed the current offense while he was still serving the sentence that was imposed in 1997. The court acknowledged the serious nature of his prior convictions. The court also found the current offense was “a felony matter, and it was committed inside the prison. The defendant does fall within the Three Strikes parameters as well as the intent of the legislature for whom the Three Strikes law was intended. I am not exercising my discretion to strike any strikes in this matter. [¶] I do note that the defendant did have the 8.47 net grams of marijuana, and they were contained in different cellophane bindles throughout, so it wasn’t just some personal use in this matter.”

The court imposed the third strike term of 25 years to life, to run consecutive to the determinate term defendant was already serving.

DISCUSSION

I.

THE COURT DID NOT ABUSE ITS DISCRETION WHEN IT DECLINED TO DISMISS DEFENDANT’S PRIOR STRIKE CONVICTIONS

Defendant contends the court abused its discretion when it denied his request to dismiss one or more strikes. Defendant argues the court erroneously focused on the felony nature of his current offense when it imposed the third strike term, and it was not aware of the full scope of its discretion when it denied his request to dismiss under section 1385.

Section 1385 grants trial courts the discretion to dismiss a prior strike conviction if the dismissal is in furtherance of justice. (§ 1385, subd. (a); *Romero, supra*, 13 Cal.4th at pp. 529-530.) In deciding whether to dismiss a prior strike conviction, the trial court “must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).)

The trial court’s decision not to dismiss a prior strike conviction is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) An abuse of discretion is established by demonstrating the trial court’s decision is “irrational or arbitrary. It is not enough to show that reasonable people might disagree about whether to strike one or more of his prior convictions.” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310.) When the record shows the trial court considered relevant factors and acted to achieve legitimate sentencing objectives, the court’s decision will not be disturbed on appeal. (*Ibid.*)

Defendant argues the court failed to consider the factors set forth in *Romero* and *Williams*, and it did not understand the full scope of its discretionary power under section 1385. Defendant further argues the court improperly denied his motion to dismiss based only on the existence of his prior strike convictions and that he committed the current offense while in prison. At the sentencing hearing, however, the court stated it was familiar with the relevant factors to consider as to whether it should dismiss the strike convictions. The court reviewed defendant's criminal history and rejected his argument that the current offense should be treated as a misdemeanor. The court acknowledged it had discretion to dismiss one or more prior strike convictions under *Romero* and section 1385, but found a third strike term was appropriate in this case. The court particularly noted that defendant possessed more marijuana than just for his own personal use in a prison setting. The entirety of the record reflects the court did not abuse its discretion when it denied defendant's request to dismiss the prior strike convictions, and the court did not impose the third strike term simply because defendant was eligible for it.

Defendant next contends the court relied on inappropriate factors and simply imposed the third strike term because his current offense was a felony. Defendant asserts the court's analysis "'became disconnected from the evidence and entered the realm of imagination, speculation, supposition and guesswork.'" This language is from *People v. Cluff* (2001) 87 Cal.App.4th 991, 1002 (*Cluff*), where the defendant was sentenced to a third strike term after he was convicted of failing to comply with the sex offender registration requirements. *Cluff* held the trial court abused its discretion when it denied the defendant's motion to dismiss the prior strike convictions. (*Id.* at p. 994.) *Cluff* held substantial evidence did not support the "critical inference" upon which the trial court relied in denying the defendant's motion to dismiss (*id.* at p. 997), i.e., that the defendant failed to annually update his registration with the intent to "'obfuscate' his true residence." (*Id.* at pp. 1002-1003.) *Cluff* characterized the defendant's offense as "the most technical violation of the section 290 registration requirement we have seen." (*Id.*

at p. 994.) *Cluff* noted the defendant had been released from prison in 1990, he had properly registered a number of times over the next five years, and although he failed to update his registration after his birthdays in 1996 and 1997 (a requirement that became effective on January 1, 1995), he continued to reside at his last registered address, where the police were able to contact him in October 1997. (*Id.* at pp. 994-996.)

Cluff is clearly distinguishable from the instant case. While defendant's conduct in this case was surely not the worst example of a felony offense, he did not commit a technical violation of possessing marijuana in prison.

Defendant further argues that since his prior strike convictions occurred in a single case, it is "apparent" the prior convictions stemmed from "a single period of aberrant behavior," such that the court should have dismissed one or more of his prior strike convictions. Defendant's argument is based on *People v. Burgos* (2004) 117 Cal.App.4th 1209 (*Burgos*) and *People v. Benson* (1998) 18 Cal.4th 24 (*Benson*). *Benson* held that a prior conviction may be treated as a strike even if the sentence for that conviction was stayed under section 654. (*Benson, supra*, at p. 31.) However, *Benson* left open the possibility that the trial court had discretion to dismiss a prior strike conviction in situations "in which two prior felony convictions are so closely connected--for example, when multiple convictions arise out of a single act by the defendant as distinguished from multiple acts committed in an indivisible course of conduct--that a trial court would abuse its discretion under section 1385 if it failed to strike one of the priors." (*Id.* at p. 36, fn. 8.)

Burgos relied on *Benson* and held that "where the two priors were so closely connected as to have arisen from a single act, it would necessarily constitute an abuse of discretion to refuse to strike one of the priors." (*Burgos, supra*, 117 Cal.App.4th at p. 1215.) *Burgos* held the trial court in that case should have dismissed one of the defendant's two prior convictions because they were "so closely connected" and arose from the "same single act." (*Id.* at p. 1216.) *Burgos* further held there were no other

circumstances indicating the defendant in that case deserved to be sentenced as a third strike offender. (*Id.* at pp. 1216-1217.)

We note that *Burgos* did not hold that a trial court automatically abuses its discretion when it declines to dismiss one of two prior strike convictions that arose from the same act or course of conduct. The trial court has broad discretion to consider many factors in its determination whether to dismiss a prior strike conviction. (*People v. Carmony, supra*, 33 Cal.4th at pp. 377-378; see also *People v. Ortega* (2000) 84 Cal.App.4th 659, 667-669.) The “‘same act’ circumstances ... provide a factor for a trial court to consider, but do not *mandate* striking a strike.” (*People v. Scott* (2009) 179 Cal.App.4th 920, 931.)

Moreover, while defendant’s prior record might arguably appear to place him within the ambit of *Benson* and *Burgos*, he failed to present any evidence as to the underlying facts of his six prior strike convictions. The entirety of the record simply states that defendant was convicted of multiple felony offenses in a single proceeding in Riverside County and he was sentenced to 21 years. There is no evidence in the record that defendant’s convictions were so closely connected and arose out of a single act as explained in *Burgos* and *Benson*.

The trial court herein was aware of its discretion and carefully reviewed defendant’s criminal record. Based on the record before it, we cannot hold that as a matter of law the trial court abused its discretion in denying defendant’s request to dismiss his prior strike convictions.

II.

CRUEL AND/OR UNUSUAL PUNISHMENT

Defendant contends the imposition of an indeterminate third strike term of 25 years to life for the felony offense of possession of marijuana in a prison facility constitutes cruel and/or unusual punishment in violation of the United States and California Constitutions.

The purpose of the Three Strikes law is not to subject a criminal defendant to a life sentence merely on the basis of the latest offense. Rather, the purpose is to punish recidivist behavior. (*People v. Diaz* (1996) 41 Cal.App.4th 1424, 1431; *People v. Kinsey* (1995) 40 Cal.App.4th 1621, 1630-1631.) Habitual offender statutes have withstood constitutional scrutiny based on assertions of cruel and unusual punishment, as well as claims of a disproportionate sentence. (See *People v. Ayon* (1996) 46 Cal.App.4th 385, 398-400, overruled on other grounds in *People v. Deloza* (1998) 18 Cal.4th 585, 593-595, 600.)

Defendant argues that the instant offense was “a passive, nonviolent crime, presenting a low degree of danger to society,” and his offense would have been a misdemeanor if committed outside of prison. However, “society’s interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence. [Citations.]” (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826.) Moreover, defendant is being punished not merely for the current offense but also because of his recidivism. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1432.) In evaluating the factors set forth in *In re Lynch* (1972) 8 Cal.3d 410, defendant’s sentence is not so disproportionate to the crime that it shocks the conscience, and it does not violate the state constitutional prohibition against cruel or unusual punishment. (See *People v. Stone* (1999) 75 Cal.App.4th 707, 715; *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510-1517; *People v. Cooper, supra*, 43 Cal.App.4th at pp. 825-828; *People v. Cline* (1998) 60 Cal.App.4th 1327, 1337-1338.)

In addition, defendant cannot demonstrate that his sentence violates the prohibition against cruel and unusual punishment contained in the federal Constitution. (*Lockyer v. Andrade* (2003) 538 U.S. 63, 66-67, 77 (*Andrade*); *Ewing v. California* (2003) 538 U.S. 11, 29-31 (*Ewing*); *People v. Cooper, supra*, 43 Cal.App.4th at pp. 820-825.) In *Ewing*, the United States Supreme Court held that the cruel and unusual punishment clause of the federal Constitution contains a narrow proportionality principle

that prohibits grossly disproportionate sentences. (*Ewing, supra*, at p. 23.) The court upheld a 25-year-to-life sentence under the Three Strikes law for a defendant with prior burglary and robbery convictions who shoplifted three golf clubs. (*Id.* at pp. 17-18, 29-31; see also *Andrade, supra*, at pp. 66-68, 77 [two consecutive terms of 25 years to life under Three Strikes law for thefts of videotapes not grossly disproportionate].)

Defendant contends his situation is similar to that addressed in *People v. Carmony* (2005) 127 Cal.App.4th 1066, where the court found a third strike sentence of 25 years to life imposed for the defendant's failure to reregister as a sex offender violated both the 'federal and state constitutional prohibitions against cruel and/or unusual punishment. In doing so, the court emphasized that defendant had in fact registered, and his failure to reregister was a purely technical violation with no practical effect. (*Id.* at p. 1078.) "Here, there was no new information to update, and the state was aware of that fact. Accordingly, the requirement that defendant reregister within five days of his birthday served no stated or rational purpose of the registration law and posed no danger or harm to anyone." (*Id.* at p. 1073.) "Because a 25-year recidivist sentence imposed solely for failure to provide duplicate registration information is grossly disproportionate to the offense, shocks the conscience of the court and offends notions of human dignity, it constitutes cruel and unusual punishment under both the state and federal Constitutions." (*Ibid.*) The court specifically declined to consider "the appropriateness of a recidivist penalty where the predicate offense does not involve a duplicate registration." (*Id.* at p. 1073, fn. 3.)

In contrast to *People v. Carmony, supra*, 127 Cal.App.4th 1066, defendant's convictions in the instant case were not technical violations of the law that "served no stated or rational purpose." (*Id.* at p. 1073.) Defendant's case is clearly within the parameters set by *Ewing* and *Andrade*. As in those cases, "[i]f terms of 25 years to life and 50 years to life are not "grossly disproportionate" for petty theft with prior felony convictions," then the indeterminate term imposed here is not grossly disproportionate to

the offense of possession of marijuana in a prison facility, given defendant's criminal history of prior strike convictions and incarceration when he committed the instant offense. (*People v. Em* (2009) 171 Cal.App.4th 964, 977; see *Andrade, supra*, 538 U.S. at p. 77; *Ewing, supra*, 538 U.S. at pp. 28-30; *People v. Romero, supra*, 99 Cal.App.4th at pp. 1432-1433.)

DISPOSITION

The judgment is affirmed. There are no publishable issues. The parties have waived oral argument.

Poochigian, J.

WE CONCUR:

Cornell, Acting P.J.

Dawson, J.